Binding Legal Authority and Agency Law

Objectives

1. Given various choices, indicate those situations in which contracting officers do not possess authority, either by virtue of the limitations imposed on their express authority, or judicially recognized limitations on the inherent authority of their position.
2. Given a factual situation, apply the concept of equitable estoppel to illustrate whether the government may be liable for the otherwise unauthorized acts of its representatives.
3. Given examples, identify circumstances under which actions of an unauthorized government agent may be ratified.
4. Identify the means by which a contracting officer receives authority and how that may be delegated, and identify the impact of such delegation; identify the tools available to a contracting officer to control such delegation.
5. Identify the process by which a contracting officer is granted authority to engage in "contingency contracting."
6. Provided various factual situations, apply contract formation concepts to electronic contracting acquisitions to determine the point at which a contract comes into existence.

Authority and Power of the United States to Contract

Inherent Power To Contract - Among the powers delegated to the United States is the authority to enter into contracts. Though some of the specific contract duties are authorized in the Constitution, other duties are implied in governmental theory. The United States Government has the right to contract, as an essential element of its sovereign powers. This right is not expressed in so many words, but instead is implied from the theory that a government is charged with the performance of public duties, and that to fulfill these obligations, contract formation is not only proper but necessary. The Federal Government is one of delegated powers, and this right to contract is limited in scope to the authority delegated to the Government. Therefore, in order to ascertain whether a particular contract entered into by the Government is valid, it would be necessary to examine the subject matter of the contract in light of constitutional authority. Both the executive and legislative branches of our Government are delegated specific duties under the Constitution, as described in the first reading, and in carrying into effect the majority of these duties it is necessary for a branch of the Government to enter into contracts with non-government parties. For example, Article I designates the power that is vested in Congress, and Section 8 of that Article lists a number of important powers that require contract formation such as "To raise and support Armies." "To provide and maintain a Navy," and "To borrow Money on the credit of the United States."

One of the most important clauses in the Constitution (Section 8, Clause 18) authorizes the Congress "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this

Constitution in the Government of the United States, or in any Department or Officer thereof." This is called the "necessary and proper clause"; together with the President's constitutional duty to "take Care that the Laws be faithfully executed" (Article II, Section 3), it supplies the constitutional power for the Government to enter into contracts, or engage in other acts which discharge responsibilities delegated to it by express provisions of the Constitution.

The Concept of Authority

The role of the Contracting Officer or agent is important in forming contracts. Since the agent exercises certain powers, his actions are crucial to the legal relations between the principal and the third party.

Principal-Agent Relationship - What a person can do himself, he can generally appoint someone else to do for him. In many cases it is not only permissible for one to act for another, but absolutely necessary. This is true in situations where the one who must perform an action is not an actual person, but either a corporate or governmental entity. The U.S. Government can act only through agents. For example, the Government cannot sign a contract; only a person can do that. An agent can be defined as one who represents another person, called a principal, in contractual matters. The relationship created by the association of a principal and agent is called agency. The agency relationship arises when the principal authorizes the agent to act as his representative with respect to another person (a "third party") and the agent consents to do so.

Authority of the Agent – A contracting officer is an agent of the Government. The link that binds third parties to the principal is the concept of authority. "Authority is the power of the agent to affect the legal relationships of the principal by acts done in accordance with the principal's manifestations of consent to him." *(Restatement* of *Agency, Section* 5). This authority depends on the type of agency that is created by the principal and agent. Agencies are usually classified as either

1. Real or actual, or
2. Apparent.

Real or actual agency is further divided into express, implied, and "by operation of law." It will be fruitful to discuss each of these types of agency in some detail.

Express Authority - A contracting officer has both express and implied authority. Express agency or authority is, as the name indicates, created by explicit language either in writing or orally. Agency created by spoken words is generally as binding as agency created by a writing. However, it is sometimes more difficult to prove. Where authority is given in writing, the writing itself ordinarily supplies the element of proof necessary where a dispute arises concerning the agency relationship. In those cases where the writing is ambiguous, "parol" or oral evidence may be used to prove the existence and limits of the authority, subject to the rule that oral evidence may not be used to contradict the plain and clear meaning of writing.

There are three exceptions to the express authority rule:

1. A contracting officer can only operate within the limits of his warrant, i.e. dollar amount and transaction type;
2. A contracting officer may never act in violation of law or regulation; and
3. A contracting officer does not have authority to enter into contracts that contradict standard industry practice.

Apparent Authority - Apparent authority is not real or actual authority, but is invoked by the courts on equitable grounds. The purpose in finding such authority is to prevent unjust injury of a third party who relies on the appearance, created by the principal, that the agent is authorized to act for the principal.

It is well-settled in Government contracting that apparent authority will not bind the Government. Certain elements must be found before apparent authority becomes effective to bind the principal. First, it is only when the appearance that the agent has authority is created by the principal's statements or actions, and not the agent's own action, that the courts will bind the principal on the basis of apparent authority. Secondly, the appearance created by the principal must be such that the third party's reliance on it was reasonable. Thirdly, this reasonable reliance must have resulted in some detriment (injury) to the third party. There are numerous situations wherein agency by apparent authority can be found. One of the most frequent areas is where the principal puts someone in charge of property or of a business where ordinarily the person in such a position is given certain authority. Thus, where a store owner asks a friend to "mind the store but don't sell anything or take any orders" and a customer then buys an article under circumstances where the customer could not but believe that the friend was in fact a sales clerk, the friend will be found to have had the necessary authority to make the sale under the theory of apparent authority. Other cases arise where there is an actual agency relationship between the principal and his agent, but the agent is given less authority than is usually vested in agents in similar positions. Where a third party justifiably relies to his detriment on the usual authority of such persons in similar positions, and the agent exceeds his actual authority, the principal will be bound as a result of the doctrine of apparent authority. The existence of apparent authority is determined on the basis of the particular facts in each case. Apparent authority has sometimes been called "agency by estoppel" because it is based on the principal's representation to the third party that the agent has authority.

There are a number of exceptions to the rule that the Government is not bound by Apparent Authority. Those exceptions include estoppel, implied authority, imputed knowledge, ratifications and waiver. None of these exceptions give the Government actual authority; they simply provide an exception to the apparent authority rule.

Equitable Estoppel - Exemption of the Government from application of the doctrine of apparent authority may have harsh consequences for a contractor who relies in good faith on the - Government's representations. One basis for holding the Government liable

for the results of its incorrect representations is the doctrine of *equitable estoppel.* Where a Government agent makes false (presumably mistaken) representations in an area where he is authorized to make representations, the Government will generally be bound by such misrepresentations. A more difficult problem arises where the agent either exercises authority that he does not have, although the department, which he represents, does in fact have such authority, or acts in excess of his actual authority. In either of these cases it is possible that the Government will be estoppel from asserting that the agent lacked the authority that he exercised.

The reason for allowing the third party to hold the Government to contracts based on the unauthorized acts of its agents is not much different than it is in the area of private contracts. The form of estoppel employed by contractors to bind the Government to the actions of its agents is called "equitable estoppel." It arises only when two necessary conditions exist:

1. The Government is acting in its proprietary, rather than sovereign, capacity; and
2. The agent of the Government is acting within the scope of his authority.

In brief, a sovereign function is one that is uniquely governmental in nature; a proprietary function is one in which the government acts as a private party would act, usually involving a commercial-type activity. Procurement is a proprietary function of government, so equitable estoppel can apply to Government contracting; and most actions of Government contracting personnel are within the scope of their authority, even when they make mistakes.

When these two conditions exist, the Government may be estopped from denying the binding nature of its agent's action when the four elements of equitable estoppel are present:

1. The Government knew the "true" facts;
2. The Government intended the contractor to rely on its actions;
3. The contractor was ignorant of the facts; and
4. The contractor relied, to its detriment.

A comprehensive discussion of the doctrine is given in *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 99 (9th Cir., 1970). The Comptroller General has applied the doctrine in bidding situations. *Fink Sanitary Service, Inc.*, 53 Comp.gen.502 (1974). Although the doctrine is employed sparingly, the courts expect the Government to turn "square corners" (deal honestly and forthrightly) in its dealings with the people.

Implied Authority - The second type of actual agency or authority is implied authority. Usually this term means incidental authority. It frequently happens that an agent is expressly assigned a task to accomplish, but the minor details are not spelled out in the oral or written authority given to him. It can be safely assumed that the agent has implied authority to do what must be done in order to accomplish the purpose of the express agency. This implied authority is usually defined in general terms to include

authority to do what is "usual, customary and necessary." One formulation of the standard is whether the authority to bind the Government is an integral part of the duties assigned to" the agent, *Appeal* of *News Printing Company, Inc.*, GPOBCA No. 13-94 (1998), but application of this rule may be difficult. For example, in *Dolmatch Group, Ltd. v. U.S.*, 40 Fed.CI. 431 (1998), the Government agent's job description included "initiating proposals" and "negotiating the terms" of contracts; the court held that since these duties could actually be performed without contractually binding the Government, the agent lacked contracting authority. A delegation of authority may be implied not by the terms of an express authority relationship, but by the conduct of the parties (sometimes called an "implied delegation" of authority). For example, if a sales agent offers price discounts to customers and the sales manager is aware of that practice but does not object, then a court could conclude from their conduct that the agent actually had authority to offer discounts even if his employment agreement did not say so. See, e.g., *Moore v. Switzer,* 78 Colo. 63 (1925). See also, *Dan Rice Const.* Co. *v. U.S.*, 36 Fed.CI. 1 (1996). It should be emphasized that implied authority is actual authority, and its existence is not based on the third party's knowledge or state of mind.

Imputation of Knowledge - Probably the most outstanding characteristics of the relationship, as it affects third parties, are the imputation to the principal of knowledge acquired by the agent. Any knowledge acquired by the agent, within the scope of his duties, must be relayed to his principal if the agent either does not relay the information, or does so belatedly, the principal may suffer injury as a result. The rationale for imputing the agent's knowledge to the principal is that as to third parties, the agent is identical to the principal for purposes falling within the scope of his agency.

There are several exceptions to this rule that relieves the principal of liability for knowledge not communicated to him by his agent. First, where the agent acquires knowledge from a source that requires that he keep it confidential, such knowledge will not be imputed to the principal. Secondly, where the agent and the third party collude to cheat or injure the principal, the knowledge of the agent will not be imputed to the principal. Thirdly, where the agent acquired knowledge in some capacity other than as the principal's agent, such knowledge will not be imputed to the principal.

Ratification - Whether an agent has the authority to bind the principal in forming a contract depends on the facts existing at the moment when the agent purports to enter a contract, in behalf of the principal, with a third party. Facts or events happening after the purported contract formation are not material to the question of whether such authority existed. However, where no actual authority existed, it is possible that the lack of authority can (in effect) be corrected retroactively. The action involved is called ratification. As a general rule, a principal may ratify an unauthorized act of his agent that the principal could have authorized at the time that the agent performed the act. If the agent actually acted for his own benefit, then the principal cannot ratify.

The rules applicable to ratification in connection with Government contracts are approximately the same as for private contracts. An agreement made by an agent of the Government, which is not binding because the agent lacked the authority to act, may

become binding on the Government upon ratification by a superior agent who had the power to grant the authority at the time the agreement was made. The Head of the Contracting Activity usually has this authority. Ratification may be especially important in connection with Government contracts because of the fact that the Government is bound only by the actions of its agents who have actual authority, not apparent authority.

The Government may be legally bound by acts of its agents, even though the authority of the agent as exercised is not spelled out in a statute or regulation. Where a Contracting Officer has express authority to act, his warrant generally implies authority to take the necessary actions to implement the responsibility assigned to him. If an agent of the Government needs to act in order to accomplish the express authority, he has implied authority to do whatever is necessary to carry into effect his express obligation. This is the doctrine of implied authority, discussed earlier. The rules regarding implied authority as applied to government contracts are no different from those applied in private contracts.

Ramifications of the Principal-Agent Relationship

Fiduciary Relationship - It is generally stated that there exists between the principal and agent a fiduciary relationship that requires the utmost good faith and loyalty on the part of the agent in the performance of his duties for the principal. The agent must act solely for the principal and must not work against the principal's best interests in the agent's own personal capacity.

Liability of Agent - An agent is liable to his principal for the wrongful use of the principal's property that is in the agent's charge. If the agency relationship is known to the third party, the agent is not liable in his personal capacity for any of the contracts that he enters in behalf of his principal, unless he exceeds his authority and the principal does not ratify his unauthorized acts. In such a case, the individual could be held personally liable.

Government Authority

Authority has been delegated to branches of the Government by the express or implied terms of the Federal Constitution; redelegation is often necessary to carry into effect the assigned duties and granted powers. The Federal Acquisition Regulation, which is a codification of redelegated authority, intended to implement the responsibilities assigned to the branches of Government by the Federal Constitution. The Federal Acquisition Regulation *(FAR)* was issued in accordance with the Office of Federal Procurement Policy Act, 41 U.S.C § 401 *et seq*. It established a Government wide procurement system, subject to discretion accorded by statute to specific Departments or agencies. The FAR unifies the implementation of the exercise of the authority by subordinate officers and agents, and specifies the duties, responsibilities and express authority of agents contracting for the benefit of the Government. Thus it can be readily seen that the Constitution, statutes, and executive department regulations provide a framework within which the concept of authority is applied.

Question: Is the Air Force contractually bound by the promise of a Deputy Assistant Secretary of the Air Force to pay more than its share of the cost of an environmental cleanup? See *TOWN OF FLOYD v. U.S.* at Vol. 2.

Delegating Authority

Express Delegation - FAR Part 42 provides detailed guidance as to how to assign (delegate) interagency contract administration responsibilities and delegating contract administration authority from the contracting office making award to the contract administration office (CAG). It also specifies the extent of CAG authority and how certain contracting authority may be withheld from the CAO (or expanded). There is, however, little regulatory guidance concerning how day-to-day contracting officer authority may be delegated. Judicial and administrative decisions recognize that authority may be delegated not only in writing, but also orally and by implication, *i.e.*, the conduct of Government officials in authority amounts to an assignment of certain authority. Authority issues frequently concern whether the CO has impliedly delegated his authority, not whether the authority in question is express or implied.

Contingency Contracting

Contracting officers have the authority to engage in contingency contracting when requirements cannot be satisfied by the normal acquisition process. When an emergency arises which requires an urgent acquisition, the contracting officer should first look for any existing contracts, purchase orders, blanket purchase agreements, and delivery/task orders to satisfy the requirement. If none of those are available, noncompetitive contracts can be let under "unusual and compelling circumstances." Lack of planning, personnel turnover, or expiring funds are not valid justifications. Procurement through negotiation offers the fastest method of obtaining goods and services, and can be accomplished by an oral solicitation and request for an oral offer. If an oral solicitation is inappropriate, an agency could issue a letter request for proposal (FAR 6.302). While an agency must solicit offers from as many potential sources as is "practicable under the circumstances," only one offeror should be sought if there is no reasonable likelihood of receiving other offers that meet the Government's needs. If one firm is solicited, the only evaluation required is that the goods or services meets the agency needs. Price may be definitized later.

The head of the contracting activity or designee has the flexibility to allow and award of a letter contract when there is not enough time to make a definitized award (FAR 16.603). The only clauses required to be included in the letter contract concern the price definitization schedule (FAR 52.216-24) and limitation of Government liability (FAR 52.216-25). While there is no firm rule dictating how long a contingency contract may run, periods of performance as long as nine months have been found justified, yet in another case four months was considered excessive. Even without precise guidelines and a step-by step procedure outlined by FAR or statute, existing acquisition rules have enough built-in flexibility to allow contracting officers to quickly respond to emergencies without waivers or deviations from required procedures.

Electronic Transmissions

Another problem area involves electronic contracting. Many jurisdictions have yet to definitively establish a digital contract as one that constitutes a "writing" for purposes of the Statute of Frauds. Issues can arise regarding the authentication of a message, signature, and contract formation. One possible solution is the creation and verification of signatures by cryptography. Another solution lies with revising the UCC. Presently draft revisions of the UCC, currently under consideration, replace the terms "writing" with "record" and "signature" with "authentication".

The oral contract as such is not used in government contracting. There is a statutory requirement that any obligation of Government funds be supported by "documentary evidence of a binding agreement that is ... in writing ..." (31 U.S.C. § 1501). Oral orders under the small purchase threshold may be placed with Federal Supply Schedule contractors (000 FAR SUPP 208.405-2) and the "writing" requirement is satisfied by the contractor's use of a delivery ticket.